ASPECTS OF PRIVACY IN THE CIVIL LAW

by

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I. Introduction
The word "privacy" is not a new one to the English language. The Oxford English Dictionary traces the use of the word "privacy" in the sense of "[t]he state or condition of being withdrawn from the society of others, or from public interest; seclusion" back to c. 1450. The OED also cites a speech from Shakespeare's "The Merry Wives of Windsor" (1598) in which privacy is spoken of in the sense of the "[a]bsence or avoidance of publicity or display; a condition approaching to secrecy or concealment". These are indeed the senses in which most people would comprehend the word "privacy" today. But from the latter part of the nineteenth century to the present day many other attempts have been made to define privacy. Definitions have ranged from Cooley's simple, all-embracing "right to be let alone"; to Westin's "the claim of individuals, groups, or institutions to determine for themselves when, how, and to what extent information about them is communicated to others"; to Van den Haag's "the exclusive access of a person (or other legal entity) to a realm of his own" excluding others "from (a) watching, (b) utilizing, (c) invading (intruding upon, or in other ways affecting) his private realm". Fleming, in his Introduction to the Law of Torts, comments (at p. 208): "Privacy is really a compendious name for several quite distinct interests liable to be impaired by different kinds of invasions, linked, however, by the common bond that they interfere with a person's wish to be let alone".

The civil law, from Roman times to the eighteenth century (the period to be considered in this study), did not know the term "privacy" or its equivalent, although it did recognise certain situations which we today should call invasions of privacy. This study is concerned with some aspects of what would today be termed privacy by the layman—whose idea of privacy would be comprehended by most of the technical definitions of privacy—and the ways in which the civil law reacted to situations that today might be regarded as invasions of privacy. The aspects of privacy to be discussed are considered in a variety of contexts in the civil law, and in what follows they will for the sake of convenience be grouped into three main sections, although it will be apparent that these sections may overlap to a certain extent. They are: privacy of the home; despectum vicini; the divulging of secrets.

II. Privacy of the Home
If one wishes to avoid publicity or the society of others, one's inclination may well be to retire to one's place of abode. This inclination would probably

have been shared by a Roman citizen. We may say that we desire privacy: a Roman might have said that he desired tranquillitas or pax or perhaps even otium, which means a "leisured life or a course of life avoiding active participation in politics, but . . . also means a state of security and peace, and . . . approaches in meaning to pax and tranquillitas, with which it is often coupled . . . "4

None of the above Latin words can be translated as "privacy", but should a Roman have achieved any of the above states he would also have obtained some degree of privacy. The Roman law gave some protection to the states of tranquillity, peace and leisure, but not by virtue of any subjective rights granted to citizens. The Romans knew of no ius tranquillitatis, ius pacis or ius otii; they possessed no absolute rights at all in today's subjective sense of the word "right".5

But a Roman's desire for tranquillity, peace or leisure in the home was protected indirectly, through the idea of the sanctity of the house.

In the early Roman times the family religion was centred around the home. The sacred fire, representing a family's ancestors, was concealed from the public view in the interior of the house. According to Fustel de Coulanges the sacred fire "était la providence d'une famille, et n'avait rien de commun avec le feu de la famille voisine qui était une autre providence. Chaque foyer protégeait les siens"6; and elsewhere: "Pour tous les actes de cette religion il fallait le secret, sacrificia occulta, dit Cicéron; qu'une cérémonie fût aperçue par un étranger, elle était trouble, souillée par ce seul regard"7.

It is not clear whether the Roman house received the protection of the secular law in the earliest times. According to one writer: "When the religious basis was still strong, the disturbance of the domestic peace was not yet regulated as a private or public offence. One brought down the anger of the gods on one's own head. Interference by the ius humanum was unnecessary"8. It does appear that the Twelve Tables probably dealt—at least indirectly—with the inviolability of the house, for Gaius, commenting on the Twelve Tables, remarks: Plerique putaverunt nullum de domo sua in ius vocari licere, quia domus tutissimum cuique refugium atque receptaculum sit, eumque qui inde in ius vocaret vim inferre videri (D.2.4.18).

As the old Roman religion declined so presumably did the sanctity, in the literal sense of the word, of the home. But the idea of one's home as a refuge seems to have persisted. In the first century B. C. Sulla's Lex Cornelia de injuriis (81 B.C.) provided that one who forcibly entered another's house was guilty of an offence9. Although this law was passed with the intention of bringing about public order in turbulent times, it reinforced the Roman idea of the home as a refuge. Later in the first century B.C. Cicero, addressing the pontifical court in the matter of the restoration to him of his own home, used words that were to be quoted countless times in later centuries:

4. Ch. Wirszubski, Libertas as a Political Idea at Rome During the Late Republic and Early Principate, Cambridge 1950, p. 92 (footnotes omitted).
7. Ibid., p. 36 (footnote omitted).
9. D.47.10.5pr.